



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 215 OF 2003

ALLOYS KAYIHURA KAVEN.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

This is the plaintiffs application for an order of injunction to restrain defendant from selling plaintiffs land L.R No. 14431 Ngong Town and /or L.R Ngong/Town/Block 1/252 until the hearing and the determination of the suit.

I have studied the averments in the plaint. I have also studied the supporting affidavit replying affidavit and Counsels submission.

According to the plaint and supporting affidavit plaintiff paid the initial loan of shs 250,000 and overdraft of shs 150,000. Plaintiff later took another loan of shs 300,000 which he repaid Those previous loans were secured by a charge over his property LR No. 14431 Ngong Town. Plaintiff claim is that after he had repaid the loan defendant started irregularly charging deposit mobilization fees (DMF) which was later converted into an overdraft loan and demanded shs 1,121,970/10

The relief's sought in the plaint include an order that accounts be taken and a declaration that plaintiff does not owe defendant any money. Paragraphs 6 – 11 of Rael Kigen's replying affidavit explains the transaction between plaintiff and defendant . The letter dated 6.4.99 (Ex "RK2") shows how the sum of shs 1,121,970/10 is made up. It is made up of overdraft of shs 362,301/20 and loan of shs 759,508/90. That document further shows that:

- (i) Parties agreed that plaintiff would pay the balance of shs 1,121,970/70 at shs 50,000 per month for 36 months.
- (ii) A further legal charge over L.R No. Ngong/Ngong/14431 to cover total exposure was to be executed
- . (iii) Deposit mobilization fees would be charged in the specified circumstances.

Plaintiff signed the that letter thereby accepting the terms and conditions on 8.4.99 therein.

Firstly plaintiff has not shown that the previous banking facilities were repaid. He did not annex out a single document from the bank (defendant) to show that indeed the original loan had been repaid.

Secondly plaintiff does not dispute that he has not honoured the terms and conditions of the letter dated 6.4.99 and terms and of the second further charge dated 30.4.99.

Thirdly plaintiff does not deny that the correct procedure had been followed to recover the debt. Plaintiffs case appears to be that he is not liable to pay shs 1,121,970/10 which is made up of irregular Deposit mobilization fees. The letter of offer dated 6.4.99 which plaintiff signed contradicts plaintiffs case that the sum of shs 1,121,97/00 is made up of Deposit mobilization fees. That document speaks for itself. Oral evidence to contradict its terms of admissible.

The facts which are the basis of the plaintiffs claim form part of the letter of offer dated 6.4.99 and the second further charge dated 30.4.99 The two documents were executed in 1999 they form the contract between plaintiff and defendant. Plaintiff has come to court almost four years after the contract was made to say that he should not pay the sum contained in the contract. That contract is binding on the parties and the court cannot rewrite. By that contract plaintiff agreed that it owed defendant the sum of shs 1,121/970/10 and executed a second further charge to secure that sum., Plaintiff has not shown why he should be relieved from the terms of the contract. Indeed this is not a suit for rescission of the contract.

Lastly, it is apparent that this suit was filed merely to temporarily assist the plaintiff to stop the intended sale of the charged property. Plaintiff had filed a previous suit HCCC NO. 1371/2000 and a previous application in that suit for an order to stop the sale of the same property. That suit was withdrawn on 13.8.2002. The plaintiff in this suit is an exact copy of the plaint in HCC No.1,371/2000. The fact that the previous suit was withdrawn shows that the purpose of filing the previous suit and this suit was merely to get an order of injunction to stop the sale and to have the issue raised in both plaints determined. Prima facie this suit and application is an abuse of the process of the court..

For those reasons I dismiss the application with costs which should be taxed and paid forthwith.

E. M. Githinji

JUDGE

3.4.2003

Mr. Koyoko holding brief for Mr. Olubayi present

Mr. Odera holding brief for Mr. Njeru present